1980

Bennett Leasing Co., A Utah Corporation v. Walker Realty Inc. , A Utah Corporation, And Ralph Walker, An Individual v. M. K. Komputer Corporation, A Corporation : Brief of Third Party Defendant And Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

BENNETT LEASING CO., A Utah Corporation,

Plaintiff and Respondent,

vs.

WALKER REALTY INC., A Utah Corporation, and RALPH WALKER, an individual,

Defendants, Third party Plaintiffs and Respondents,

vs.

M. K. KOMPUTER CORPORATION, A Corporation,

Third party Defendant and Appellant.

Case No.

BRIEF OF THIRD PARTY DEFENDANT-

Appeal from judgment of the First J
Of the State of Utah, in and for the
Honorable Vanoy Christoffe

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Clerk, Supreme Court, Utah

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Third party Defendant and Appellant.

Case No. 16458

BRIEF OF THIRD PARTY DEFENDANT-APPELLANT

Appeal from judgment of the First Judicial District
Of the State of Utah, in and for the County of Cache
Honorable Vanoy Christofferson, Judge

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NATURE OF THE CASE

This is an action based in contract where the Plaintiff-Respondent purchased a computer from the Third Party Defendant-Appellant and leased the computer to the Defendants, Third Party Plaintiffs-Respondents. The Defendant, Third Party Plaintiff-Respondent defaulted on the lease seeking to have the Third Party Defendant-Appellant repurchase the computer pursuant to a buy back agreement.

DISPOSITION IN THE LOWER COURT

On December 12, 1978, the matter was tried before the Honorable VeNoy Christofferson, sitting without a jury. On the 23rd day of January, 1979, judgment was awarded in favor of Plaintiff-Respondent in the amount of four thousand four hundred sixty dollars

and forty six cents ($4,460.46), together with attorney's fe
in the amount of one thousand dollars ($1,000.00). As to th
Third Party claim the court ruled in favor of Third Party-
Plaintiff-Respondent for all amounts due by the Defendants,
Party Plaintiffs-Respondents to the Plaintiff-Respondent.

RELIEF SOUGHT ON APPEAL

Appellant seeks to reverse the decision of the District Court rendering it liable for all amounts the Defendants, Th
Party Plaintiffs-Respondents have been adjudged to owe the Pla
Respondent.

STATEMENT OF FACTS

On or about October 12, 1976, the Defendant, Third part
Plaintiff-Respondent, Ralph Walker (hereinafter referred to a
including Walker Realty) indicated his desire to purchase a C
SX 320 computer with real estate program systems from the Thi
Party Defendant-Appellant, M. K. Komputer Corporation (herei
referred to as M. K.), by signing a purchase invoice. Walker
thereafter indicated a desire for financing on the computer,
accordingly, a lease contract was entered into between Walker
and the plaintiff-respondent, Bennett Leasing Company (herein
referred to as Bennett). The nature of the transaction was t
M. K. sold the computer to Bennett for cash, and thereafter,
Bennett entered into a lease agreement with Walker, requiring
montly payments on the computer system.

On October 15, 1976, representatives from M. K. picked u
Cannon SX 320 computer at the Salt Lake International Airport
delivered said computer to Walker and installed it upon his b
ness premises. On the day of installation, three represent

of M. K. were present including President Thomas Kunz, Vice President David Morris, and Sales Representative Robert Huff. A training session was undertaken at that time to acquaint Walker and his agents-employees in the use of the Cannon computer and M. K.'s real estate system.

At the time of the delivery of the system, Robert Huff, salesman for M. K., indicated on the invoice, a copy of which was left with Walker, that there was a 90-day buy back agreement between M. K. and Walker.

Representatives of M. K. and Walker had a difficult time in getting together for training sessions with M. K., apparently missing one appointment and Walker's representatives not being present on at least two occasions when appointments had been made to provide further training to Walker and his employees in the use of the computer.

On November 8, 1976, a letter was received at the Ogden office of M. K. from Walker. The letter was dated November 4, 1976, and contained several requests, most importantly, for the written buy back agreement that Walker had been advised of at the time of the original purchase. In response to the Walker letter, David Morris traveled from Ogden to Logan on November 11, 1976, for the purpose of delivering additional tape systems, providing training, and delivering the buy back agreement. Morris testified that he delivered the tapes requested by Walker in his letter of November 4, 1976, delivered the buy back agreement, and made an appointment for an additional training session with Walker on November 15, 1976. (T. pp. 157-159) Morris further testified that Walker appeared to be in a hurry to make an appointment outside of his office and

simply said he would get back with Morris later. (T. p. 81) The buy back agreement was signed by Thomas Kunz of M. K. and they retained two copies for their files (Exhibits #4 and #10) with Walker being unable to produce his copy of the buy back agreement at trial.

On January 21, 1977, M. K. received a letter from Walker dated January 20, 1977, containing Walker's first negative statements regarding the computer and the fact that he was then exercising his option under the buy back agreement and was requesting that M. K. purchase back the computer system.

In response to the January 20 letter, representatives of M. K. called Walker several times on January 24 and 25. (T. p. 119) On January 25, 1977, Thomas Kunz succeeded in reaching Walker and arranged a meeting for the following day.

On January 26, 1977, representatives of M. K. met with Walker in Logan to discuss Walker's letter of January 20, 1977. Present at that meeting were Thomas Kunz and David Morris of M. K., and Ralph Walker. In his testimony, Walker indicated that Kunz requested a 30-day extension on the buy back agreement to facilitate further training of Walker's personnel. (T. pp. 70-71) However, Kunz and Morris stated emphatically that they advised Walker, as of that date, that M. K. would not repurchase the computer equipment because of Walker's total lack of compliance with the terms of the buy back agreement. (T. pp. 122-123) At the time of trial Walker produced no evidence showing an extension other than his testimony, which was refuted by other parties present at the meeting.

Thereafter, the agents of M. K. continued their attempts to

train Walker's staff. Walker later renewed his request that M. K. repurchase the computer. In response to Walker's requests, M. K. sought potential parties who would assume the lease, in order to maintain M. K.'s public image.

As of the trial date the computer remained in the possession of Walker, without Walker making any further payments upon the obligation to Bennett Leasing. At the time of trial, representatives of M. K. and Walker presented conflicting evidence regarding the buy back agreement.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN AWARDING THE DEFENDANT, THIRD PARTY PLAINTIFF-RESPONDENT A JUDGMENT ON A THEORY SUBSTANTIALLY VARIANT FROM ITS PLEADING.

In its Findings of Fact and Conclusions of Law the trial court determined that M. K. and Walker had a valid buy back agreement and that Walker had substantially performed its obligations under that agreement and permitted Walker to recover on the contract, although Walker's Third Party action sounded exclusively in the tort of fraud.

A. A PARTY MUST RECOVER, IF AT ALL, ON THE CASE MADE BY ITS PLEADINGS.

The Third Party Complaint (R. 19) of Walker sets forth a cause of action against M. K. exclusively in fraud. Such cause of action sets forth allegations in comport with the requirements this Court outlined in Pace v. Parrish, 247 p. 2d 273 (Utah, 1952); those elements being:

a. That a representation was made;

b. concerning a presently existing material fact;

c. which was false;

d. which the representor either

1. knew to be false, or

2. made recklessly, knowing that he had insufficient knowledge upon which to base such representation;

e. for the purpose of inducing the other party to act upon it;

f. that the other party, acting reasonably and in ignorance of its falsity;

g. did in fact rely upon it;

h. and was thereby induced to act;

i. to his injury and damage. 247 P. 2d at 274-275.

Indeed, the language of the Third Party Complaint utilized phrases similar to those found in Pace. However, further similarities between the two cases do not exist. The standard for proof in a fraud case, as set out in Pace, is clear and convincing evidence. Pace v. Parrish, supra at p.274. In the case at bar Walker failed to establish such a level of proof; indeed, Walker did not even attempt to meet that burden. Armed with the knowledge that the heavy burden could not be satisfied Walker abandoned the fraud theory at the trial to pursue a breach of contract action, an action created a variance from the pleadings.

In permitting Walker to recover on the contract theory, sprung on M. K. at trial, the trial court abandoned a rule accepted by courts throughout the land: "that a party must recover, if at all, on the case made by his pleadings..." 61 AM. JUR. 2d Pleadings

§ 382.[1] Walker's cause of action was based exclusively on the tort of fraud, yet recovery was based exclusively on contract principles. The variance between the two theories is obvious and expansive and Walker never attempted to close the gap through amended pleadings. Therefore, Walker was improperly granted a recovery on a theory substantially variant from the cause that it plead.

B. APPELLANT HAD INSUFFICIENT NOTICE AND OPPORTUNITY TO MEET THE CONTRACT THEORY AND WAS THEREBY PREJUDICED.

To avoid due process problems a party must have adequate notice to meet the allegations of his opposition. This Court stated that principle best when it noted that:

> ...if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it.

National Farmers Union Property and Casualty Co. v. Thompson, 4 Ut. 2d 7, 286 P. 2d 249, 253 (1955), quoting Taylor v. E. M. Royle, 264 P. 2d 279 (Utah, 1953)

The case at bar is not unlike Taylor v. E. M. Royle, wherein the plaintiff sued to recover money allegedly owed him for employment services rendered to the defendant. The plaintiff managed a radio and television store under a written employment contract, the contract expired on March 1, 1951 and the plaintiff stayed on the job until July of 1951, when he quit. Plaintiff's cause of action was upon a "new contract" alleged to have been consummated between March and July of 1951. At no time did the plaintiff amend his pleadings, even at trial to conform to the

1. See numerous citations to the rule at pl 779 of 61 AM. JUR. Pleadings S. 382.

proof, to reflect an action for quantum meruit. The trial court deemed no express contract existed, but permitted recovery under quantum meruit. In reversing that decision the Supreme Court held that it was error to charge the defendant with liability under quantum meruit, an issue which the defendant was never called upon to meet.

M. K. was never called upon to meet the contract issue that Walker forwarded first at trial. Walker never sought to apprise M. K. that it would proceed under a theory different from that advanced by the pleadings. The Taylor Court emphasized the importance of proper notice by stating:

> ...a defendant must be extended every reasonable opportunity to prepare his case and to meet an adversary's claims. Also he must be protected against suprise and be assured equal opportunity and facility to present and prove counterconnections, -else unilateral justice and injustice would result sufficient to raise serious doubts as to constitutional due process guarantees. 264 P. 2d at 280.

In permitting Walker to recover on a theory neither plead nor revealed to M. K., the trial court abandoned this Court's concern for justice and permitted injustice to reign. Further, the trial court did not see fit to look to the record to determine if the issue had been raised in discovery or at any other level. If the trial court would have examined the record it would have found that the contract theory was never plead and was not raised in the course of discovery or any other proceeding.

Notice of a variant theory advanced at some pretrial stage could satisfy the concerns of the court in Taylor v. E. M. Royle Corp., supra and also in Radley v. Smith, 6 Ut. 2d 314, 313 P. 2d 465 (1957). In Radley the pleadings sounded in conversi

but the court permitted recovery based on contract because the pretrial order contained a contract issue. Therein both parties had notice of an issue variant from the pleadings some time before trial. Likewise, the plaintiff in Page v. Utah Home Finance Insurance Co., 15 Ut. 2d 257, 391 P. 2d 290 (1964), had "ample opportunity to meet the [new] issue", where three weeks before trial the defendant was permitted to amend, even after the pre-trial order.

The plaintiff is Page contended that the defendant's amended pleadings on fraud issues should not have been litigated at trial, in disagreeing, the Court determined that three weeks provided... "ample opportunity to meet the issue, and that is all that is required." 391 P. 2d 290. It cannot be said that M. K. had "ample opportunity" to meet Walker's issue of breach of contract. M. K. was never advised prior to trial or even during trial that Walker would abandon the fraud claim in favor of a contract cause of action. Certainly notice of some sort is required.

M. K. could not be deemed to have received notice of the contract theory via the evidence adduced at trial. All the evidence that Walker introduced was relevant to the fraud issue, and thus was not objectionable as being at variance with the pleadings. Evidence of the buy back agreement went to the heart of the fraud theory plead, but such evidence did not satisfy, indeed, was not even offered for the purposes of proving fraud; rather, Walker sought to use the evidence for a theory that M. K. was never advised of or given proper opportunity to meet. Therefore, M. K. was thereby prejudiced.

C. APPELLANT IS NOT SUBJECT TO THE ELEMENTS OF U.R.C.P. 15(b)

BECAUSE IT DID NOT CONSENT TO TRIAL OF THE CONTRACT ISSUE AND WAS NOT REQUESTED TO OBJECT TO EVIDENCE OF THE CONTRACT THEORY.

Rule 15(b) of the Utah Rules of Civil Procedure provides as follows:

> Amendments to Conform to the Evidence.-When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merit. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

This statute does not apply in the present case because M. K. neither consented to a trial on the contract issue nor was it required to object to the evidence introduced in support of the contract theory.

General Insurance Co. of America v. Carnicero Dynasty Corp. 545 P. 2d 502 (Utah, 1976); found the Court interpreting Rule 15(b)'s provision on consent to exist "where one party raises an issue material to the other party's case, or where evidence is introduced without objection". 545 P. 2d at 506. Therein, defendant's counsel sought leave, pursuant to 15(b), to amend defendant's answer and plead lack of consideration on the indemnity agreements that were the subject of the lawsuit. The trial court denied the motion, claiming that the allegation was an affirma-

defense of which the plaintiff had no notice and further that the defendant had sufficient information from discovery to supply him with the necessary knowledge to amend the answer. In holding on behalf of the defendant, the Supreme Court determined that the issue of consideration had been tried by consent and the trial court erred in denying the defendant's motion to amend. In the present case Walker never bothered to amend the pleadings at any stage and introduced evidence that failed to provide M. K. with an objection to the variant theory because such evidence was part and parcel of the fraud claim. In effect Walker tried the case on a contract theory by itself, while M. K. defended against a fraud action, not being advised of anything different. The trial court erroneously determined that Walker could proceed in such a fashion and wrongly granted Walker a judgment. With the court permitting recovery on the unplead theory M. K. suffered a great disadvantage therefrom. M. K. thus fits within the dicta announced in National Farmers Union Property and Casualty v. Thompson, supra at p. 253 (1957) where the Court warned:

> ...as this court has held on prior occasions the adverse party should be given the benefit of every doubt. He must not have been misled nor in any way prejudiced by the introduction of the new issues.

This position was reinforced by the court a few years later in Buehner Block Co. v. Glezos, 6 Ut. 2d 226, 310 P. 2d 517, 519 (1957); where the Court cautioned that:

> "Not withstanding all of our efforts to eliminate technicalities and liberalize procedure, we must not lose sight of the cardinal principle that under our system of justice, if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it."

The simple facts herein show that M. K. had neither notice nor

opportunity to properly meet Walker's contract claim, without such M. K. cannot properly be found to have consented either expressly or impliedly to a trial of the contract issue. Therefore, M. K. is not subject to Rule 15(b) of the Utah Rules of Civil Procedure, unless the Court wishes to serve the ends of injustice.

D. THE ERROR OR THE TRIAL COURT CANNOT BE SAVED BY THE CONCEPT OF AIDER BY VERDICT.

Aider by verdict is a concept whereby a verdict or judgment cures a defective cause of action. There is a distinction between defects which are fatal after verdict and those which are not, those which are fatal arise from an entire omission of a statement of the facts which are the gist of the action, and those which are not an imperfect statement of such facts. 61 AM. JUR. 2d Pleadings § 408. In the case at bar there is a total omission of any statement of facts which are the gist of the action upon which the court found in favor of Walker.

In the often cited case of Arnold v. American Insurance Co., 148 Cal. 660, 84 P. 182 (1906), the California court dealt with a suit based upon insurance policies where the policies required that the property be used as a dwelling. At no time did the plaintiff allege that the property was used as a dwelling, despite the fact the trial court found in favor of the plaintiff. In reversing the judgment, even though evidence showed occupancy, the Supreme Court discussed aider by verdict and reasoned:

> It has, however, never been held that a defective pleading may be cured by verdict, where there is an entire absence of both direct and implied allegation of a material fact, and such a ruling

would be in violation of fundamental principles relative to pleadings.

Walker occupies a position similar to the plaintiff in Arnold; however, the defects of Walker's pleadings are even more egregious in that nothing resembling a cause of action for breach of contract can be made out. All essential and vital elements of a theory that would permit the trial court to rule for Walker are absent from the pleadings; therefore, Walker cannot be rescued by the notion of aider by verdict.

POINT II

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT DEFENDANT, THIRD PARTY PLAINTIFF-RESPONDENT COMPLIED WITH ALL OF THE TERMS OF THE BUY BACK AGREEMENT.

In the Findings of Fact and Conclusions of Law (R. 104) the trial court determined by way of Finding #8 (R. 105) that:

> 8. Walker Realty complied with all the terms of the agreement and made every effort to do so in good faith, making several requests both orally and in writing to take the machine back. Said requests were made in writing within the time specified and agreed to by Komputer Corporation.

This Finding is not supported by the weight of the evidence. The buy back agreement (Exhibits 4 and 10) required the performance of certain conditions precedent prior to any duty arising in M. K. to repurchase the computer, these conditions were:

> 1. All salesman will use the SX-320 as trained and instructed by Mr. David Morris and Robert Huff.
> 2. If at the end of each month Walker Realty will contact M. K. Komputer Corporation, if they feel the SX-320 has not been a benefit to their sales.
> 3. At this monthly time period if the SX-320 has not been a tool to increase sales, that our people be allowed to come in and retrain your salesman.
> 4. Walker Realty agrees to pay for any damage to the SX-320 serial #200 285 and Real Estate programs if M. K. Komputer Corporation has to buy them back.

Walker admitted that the first condition was not satisfied at trial

when he indicated only he and two other individuals had suffi knowledge to operate the machine. (T. p. 61)

There is some dispute as to the number of training sessi held and missed by the respective parties, but on at least t occasions representatives from M. K. scheduled appointments t train Ralph Walker and his salesman, on both occasions the M. representative found only a secretary at the Walker facility. (T. pp. 84-84, 167) Therefore, there was no compliance with first provision of the buy back agreement.

By the admission of Ralph Walker, provision number two o buy back agreement was not satisfied. In Walker's first writ communication after signing the lease, dated November 4, 1976 (Exhibit 6), Walker indicated nothing negative about the comp in fact, Walker reported no negative comments until his lette of January 20, 1977 (Exhibit 7).

Walker's failure to make the monthly reports required by the buy back agreement did not require M. K. to be held to th repurchase provision of the contract. A few days after Walke first complaint he agreed to permit M. K.'s representatives t come to his facility and provide further training, after bein advised by Thomas Kunz of M. K. that M. K. would not honor th back contract. (T.pp. 122-123) Only after the lapse of two additional months did Walker attempt to have M. K. repurchase the computer. (Ex. 8 & 9)

Examining the evidence in a light favorable to Walker, s evidence remains insufficient to support the trial court's Fi that Walker totally complied with all the conditions precedent the buy back agreement.

CONCLUSION

The trial court erred in permitting Walker to recover on a theory substantially variant from the pleadings and which is not supported by the weight of the eveidence.

For the foregoing reasons the judgment of the trial court should be reversed.

Respectfully submitted,
Farr, Kaufman & Hamilton

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MAILING CERTIFICATE

I hereby certify that I sent a true and correct copy of the foregoing Brief of Appellant to Attorney for Respondent, Scott W. Barrett, 300 South Main, Logan, Utah 84321 on this 18 day of January, 1980.

Kelly Larkin
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Secretary